Supreme Court, U.S.
FILED
NOV 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-817

DONALD EVERETT D.,
DENNIS LOUIS D.,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

The petitioners, Donald and Dennis D., respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate

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District.[1] Such judgment became final and was entered on October 10, 1978 following the issuance of an opinion on August 8, 1978.

OPINIONS BELOW

The opinion of the court of appeal affirming petitioner's convictions in the Juvenile Court for criminal offenses was filed on August 8, 1978. The unreported opinion of that court is attached to this petition as Appendix 'A'. A timely petition for rehearing in the court of appeal was denied on September 1, 1978. The order of the Supreme Court of California denying discretionary review in petitioner's case was entered on October 4, 1978. The mandate in petitioner's case was thereupon entered by the court of appeal on or about October 10, 1978.

JURISDICTION

The jurisdiction of this court is invoked under title 28, United States Code

1. The Court of Appeal for the State of California, Third Appellate District will be referred to hereafter as the "court of appeal".

section 1257(3). The order of the court of appeal became final on October 4, 1978 when the Supreme Court of California denied petition for discretionary review. (Calif. Rules of Court, Rules 25, 28.)

QUESTIONS PRESENTED

1. Where a direct appeal is permitted in a criminal or quasi-criminal case by state law, what minimum standards of substantive and procedural fairness are imposed upon the proceedings by the Fourteenth Amendment's guarantee of due process of law; specifically,

A. Are the requirements of due process met when a state reviewing court refuses to determine whether a reasonable trier of fact could have found guilt beyond a reasonable doubt in light of all the evidence presented to it; limiting its review of the facts to mere consideration of whether there is any evidence in the record, standing alone, which supports a finding of guilt?

B. Are the requirements of due process met where a state reviewing court

refuses to resolve a substantial contention raised by an appellant through a technique of refusing to recognize the existence of a portion of the trial record which supports that contention?

2. When the defendant in a juvenile criminal case is required to submit to a trial before a subordinate judicial officer who does not have the authority to decide the case, and when a proper decision of the matter requires that crucial conflicts in the testimony be resolved by assessment of the demeanor and credibility of the witnesses, are the requirements of due process met where the case is decided by a "judge" who does no more than read a reporter's transcript of the testimony presented to his subordinate which is devoid of the essential "demeanor" information ?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments which provide in pertinent part:

AMT VI: "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

AMT XIV, Section 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case arises from an incident which took place in West Sacramento, California on July 24, 1977 between petitioners, who are two minor brothers, and one Loren Perry.

In the late evening hours of July 24, Mr. Perry drove his 1955 Nash automobile into a darkened trailer sales lot which was adjacent to the mobilehome park in which the boys lived. The sales lot was also adjacent to the Hawaiian Hut, a bar known as a hangout for homosexuals.

Perry explained that it was his intention to go into the Hawaiian Hut, but

that he had decided not to park in the bar's own lot because he did not want his Nash to be dented. According to him, he exited his vehicle carrying no wallet, and with only fifty-five cents in his pocket.

Then, according to Perry, he was accosted by petitioners, threatened with various blunt objects, and asked for money. When he demonstrated he had only small change, Perry stated the boys then fled, and that he chased and physically detained Donald D. for the authorities.

The boys told a very different story, which was corroborated by a neighbor woman with whom the boys were out walking. They indicated that as Donald broke off from the group to go over and use the restroom at a nearby gas station, Perry drove into the darkened lot, accosted Donald, and issued a sexual proposition to him. Donald was frightened by this, and called for his older brother to help him in repelling what he saw as an attempt at molestation. The older Dennis responded and bluntly confronted Perry. Perhaps fearing arrest for solicitation of a minor [Cal. Pen. Code § 647a], Perry became

agitated and, in the ensuing confusion, managed to grab Donald and drag him into the Hawaiian Hut where a discussion ensued as to whether the other bar patrons should "take me over to the river and cut my throat". Apparently it was decided that calling the police and accusing Donald of attempted robbery would be a more prudent course of revenge. When officers arrived, the boys tried to relate their version of the facts but were commanded to "shut up".

At the conclusion of testimony, the subordinate referee who heard it instructed the bailiff to tell the "so called victim" he was free to leave. He then took the matter under submission, deciding it a few days later through a written memorandum[2/] in which he implied he was going no further than determining that Perry's testimony was not inherently incredible. The referee also declared he was resolving the conflicts in the testimony on the basis of his "personal opinion" that petitioners considered homosexuals "easy marks" for robbery.

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2. The text of this memorandum is reproduced in appendix 'B' to this petition.

Such "personal opinion" was supported by no testimony that petitioners, who did not appear to have prior records, had any propensity to engage in acts of violence against such persons.

In accordance with California law, at petitioners' request the matter was then submitted to a judge of the Juvenile Court for decision. The "judge", acting as the trier of fact, then "independently" decided that guilt was established beyond a reasonable doubt after privately reading a reporter's transcript of the testimony and expressly adopting the statements in the referee's advisory memorandum of decision. He personally heard no testimony.

Petitioners thereafter appealed to the court of appeal. That court affirmed the juvenile judge's findings, holding that (1) it was bound to defer to the judge's assessments of credibility of witnesses (Made upon the exact trial transcript as was before it); (2) in accordance with established precedent, it would not determine whether guilt had been determined beyond a reasonable doubt or consider any evidence consistent with innocence. Only whether the verdict was supported by

"any substantial evidence" would be considered.

The state appellate court, most significantly, refused to recognize the existence in the record of the referee's statement he was resolving the matter on the basis not of evidence presented but his own "personal opinion".

The court of appeal declined to correct its refusal to recognize this key segment of the record, as well as its refusal to consider petitioner's claims of error based upon such record, when its omissions were pointed out to it in a timely petition for rehearing.[3/]

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3. The text of petitioner's petition for rehearing is set out in appendix 'C' to the petition.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case raises a number of fundamental questions, not addressed in any recent holdings of this Court, concerning the extent to which the Fourteenth Amendment's guarantee of due process requires the states to maintain any minimum level of integrity and fairness in legally prescribed methods by which facts are found at trial and reviewed on appeal.

The Court has, of course, decreed the substantive standard according to which criminal guilt must be found, i.e., beyond a reasonable doubt (In re Winship (1970) 397 U.S. 358); but where such a standard is applied through methods which make it impossible for the requisite degree of certitude to be reached, how can it be said the standard is being followed ?

Nor has any decision of this Court gone into the question of whether the states are constitutionally free to virtually ignore on appeal the central question of whether guilt has been satisfactorily proven beyond a reasonable doubt; or whether they are free to base their conclusions of law upon arbitrary

or captious refusals to recognize portions of the record before them which support claims of error.

I

WHERE STATES ESTABLISH AVENUES OF APPELLATE REVIEW, DUE PROCESS DOES NOT PERMIT STATE REVIEWING COURTS TO REFUSE TO ENFORCE THE CONSTITUTIONAL GUARANTEE OF PROOF BEYOND A REASONABLE DOUBT WHILE PROVIDING EXTENSIVE REVIEW OF ALL MANNER OF SECONDARY QUESTIONS

The opinion of the court of appeal refuses to give any consideration to the question of whether petitioners' guilt was satisfactorily established beyond a reasonable doubt. Following a firmly established line of California decisions which hold that an appellate court may not directly consider the issue of guilt or innocence, that it must ignore all evidence consistent with innocence, and must cease its review at the point where any evidence is found consistent with guilt, even that which is "weak" or "physically impossible" (In re Leonard M. Cal. Ct. App. 2 Crim. 30946, October 27, 1978) ___ Cal.App.3d ___; ___ Cal.Rptr. ___),

the court of appeal held itself bound by the factual determinations of the "judge".[4]

This quite typical refusal of a state first-level reviewing court to be concerned with the central issue of guilt greatly accounts, in our respectful opinion, for the conversion of the criminal case into a procedural game of wits instead of a search for truth. This in turn leads to a widespread public feeling that our courts occupy themselves primarily with arcane exercises in sophistry through which they routinely free guilty persons on the basis of "technicalities"; the innocent being totally ignored.

The test of review applied by the court of appeal here was that formulated by the California Supreme Court in People v. Newland (1940) 15 Cal.2d 678, 681, 104 P. 2d 778 : "The court of appeal will not attempt to determine the weight of the

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4. The absurdity and injustice of such a holding is, of course, highlighted here by the fact that the "judge" made his finding on the same reporter's transcript as was before the court of appeal. (see part II, post.)

evidence . . . it must be made clearly to appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached in the court below." And as repeated again and again in such more recent California decisions as People v. Reyes (1974) 12 Cal.3d 486, 497 [526 P.2d 225], "The test on appeal is . . . not whether the evidence proves guilt beyond a reasonable doubt." (Emphasis added.)

Testimony given by representatives of California's appellate judiciary at a recent legislative hearing place in even starker relief the aspersion with which prevailing philsophy regards the idea that state reviewing courts should consider it their duty to correct "mere" substantive injustices.[5]

This philosophy was recently carried to the most extreme degree ever when an appellate court accepted as sufficient evidence which was shown to be physically

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5. California Legislature, Assembly Committee on Criminal Justice, Scope of Appellate Review (hearing transcript) September 11, 1978.

impossible. (In re Leonard M., supra, ___ Cal.App.3d ___; ___ Cal.Rptr. ___.)

For example, after a spokesman for the State Supreme Court confirmed that that court regards itself as ". . . not a court of error, it is not necessarily a court of justice. . . ."[6], and that decisions are often upheld if supported by any evidence at all[7], a representative of the courts of appeal, also the president of the State Judges' Association, then went on to confirm that factual review on that level is limited to consideration of whether there is any evidence which is not "inherently improbable", and that even overwhelming evidence inconsistent with guilt is treated as nonexistent.[8] Having opened with the observation that the prime function of the courts of appeal is to "develop the common law" and deal with precedent,[9] the witness closed with the sentiment that there was no room for improvement in California's system of justice, which he described as "the best system in the world".[10]

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6. Ibid., p. 21.
7. Ibid., p. 22.
8. Ibid., pp. 26-27.
9. Ibid., p. 24.
10. Ibid., p. 32.

In respectful disagreement, we submit that at least one substantial improvement is required: protection of innocent persons who are mistakenly convicted of crimes, whether or not the mistake has significant "policy" implications.

In Burks v. United States (1978) ___ U.S. ____ (Jan. 14, 1978, 46 U.S.L.W. 4632), where the Court held that double jeopardy prohibits a retrial after the reviewing court has found the evidence insufficient, the Chief Justice observed that the Court had previously reviewed factual records from federal convictions and found that the prosecution had failed to prove guilt beyond a reasonable doubt. "In holding the evidence insufficient to sustain guilt, an appellate court determines that the prosecution has failed to prove guilt beyond a reasonable doubt. (See American Tobacco Co. v. United States (1946) 328 U.S. 781, 787 n. 4." (Id. at p. 4636, n. 10.)

In Freeman v. Zahradnick (1977) 429 U.S. 1111, the Court was presented with this issue as a constitutional question. However, the Court denied certiorari, apparently because the Court would have

also had to tackle the question of whether this kind of a claim would be cognizable on federal habeas corpus (an issue which is not presented by this record). Justices Stewart, Marshall, and Brennan dissented, however, and urged that the application of the "beyond a reasonable doubt" standard of Winship should not be immune from constitutional enforcement on appeal. Justice Stewart posed the following hypothetical situation which could lead to "bizarre results":

"Defendant A, whose guilt is conclusively established by 20 eyewitnesses, clear fingerprints, and an unimpeachable confession, is denied due process if the jury is instructed that he can be found guilty by a preponderance of the evidence; that much is clear from Winship. Defendant B, against whom there is but one flimsy piece of evidence -- which falls far short of sufficiency to prove guilt beyond a reasonable doubt but barely meets the 'greater than zero' test of the no evidence rule -- is not denied due process so long as the instructions are proper. Clearly, however, defendant B is much more likely to be innocent that defendant A."

As Justice Stewart aptly concluded,

"That pair of results could well be thought to be at war with the purpose of the Winship decision -- to reduce 'the

risk of convictions resting on factual error', to provide 'concrete substance for the presumption of innocence', and to ensure that 'the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned'. 397 U.S. at 363-364."

In our view, both the cause of due process and the cause of public respect for the judicial process would be better served if at least those state reviewing courts which hear appeals on a non-discretionary, first level basis[11/] followed the example of their counterparts in other civilized nations by giving as much attention to the question of whether the case before them has been satisfactorily

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11. We quite purposely limit our argument to those stages of the appellate process wherein review is of right, as opposed to higher levels of the process wherein review is discretionary. Many countervailing considerations could well justify discretionary tribunals such as this Court or most state supreme courts in leaving review for correctness to the first-level appellate courts, reserving their own scarce resources for matters of transcending public importance. Distinctions between rights inerent in the non-discretionary vs. discretionary stages of the appellate process have been drawn by the Court on many occasions, e.g., Anders v. California (1967) 386 U.S. 738.

resolved on the facts as is afforded to procedural matters.[12]/

In England, "appellate judges tend to regard their job as complete when they reach a correct conclusion on the case presented to them . . . furthermore, they are so involved with the idea of the supremacy of Parliament that they do not think much about their own law-making functions. . . ." M. Zander, Cases and Materials on the English Legal System (1973) p. 420.

The right of a litigant to a hearing from a first-level reviewing court should be conditioned more on whether he has been unjustly convicted than upon whether

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12. The scope of review on first-level appeal suggested herein would cause no actual increase in the workload of state appellate courts. Such courts are already required to read the entire record in order to determine, for example, whether procedural errors pinpointed by the counsel are harmless. From this point, it requires very little extra effort for the court to ". . . [give] earnest thought in this case to whether it is one in which we ought to set aside the verdict of the jury notwithstanding the fact they had every advantage and, indeed, some advantages we do not enjoy." (Regina v. Cooper (Sean) (1969) 1 Q.B. 267, 271.)

his case presents some novel point of "policy" which the legal profession would enjoy seeing discussed in the reports.[13]/ Moreover, as should be readily apparent to those who have followed the mushrooming habeas corpus dockets of federal district courts, the refusal of state courts to be much concerned with the actual correctness of judgments doubtless contributes to feelings of resentment and injustice, shared by the guilty and innocent alike, which lead them to an obdurate determination to pursue every possible road of attack on their convictions.

We respectfully urge that no further time should pass before this Court decides, for the first time in the history of the republic, upon the degree to which the Fourteenth Amendment speaks to the substantive aspects of the criminal appellate process.

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13. As this Court pointed out not long ago in another context, there is a strong "public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth". (Alderman v. United States (1969) 394 U.S. 165, 174.)

A. Due Process In No Event Permits State Reviewing Courts To Engage In Reconstruction Of The Record On Appeal In Order To Avoid An Appellant's Claim Of Substantial Error

Closely related to the preceding argument is the question of whether a state reviewing court is permitted by due process to go beyond the point of applying every presumption and intendment derivable from the record in favor of a judgment and cross over into the realm of reconstruction of the appellate record in order to avoid dealing with an appellant's assignments of substantial error which arise from such record.

Here, the case against petitioners was initially decided at trial by a written memorandum opinion (see appendix 'B') which contains the following statement as a reason for decision: ". . . it is the personal opinion of the Court that the minors believed such a person [i.e., a homosexual] would be 'easy pickings'" [i.e., for mugging].

It was accordingly assigned as error on appeal that the case had been

improperly decided at trial on the basis of "personal opinion" instead of evidence, in that there had been no proof adduced that the appellants were hostile to, or in the habit of preying upon, homosexuals.

Astoundingly, the court of appeal greeted this contention with the statement, "Moreover, we find nothing in the record to support defendants' assertions that the referee . . . resolved the matter on the basis of his personal opinion. . . ." (emphasis added.) (Opn. p. 5.)

The dictionary[14] defines "nothing" as "no thing; not anything -- no part, element, or trace -- a thing that does not exist. . . ." Yet clearly, the referee's candid admission of how he was deciding this case does exist in cold black and white type in this record. As much was bluntly pointed out to the court of appeal at pages 3-4 of appellant's petition for rehearing.

The court of appeal's refusal to recognize the existence of this error-laden statement and to decide whether, indeed

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14. Webster's New World Dictionary (1976) 2d College Ed., p. 973.

it was proper for the referee to decide a case on the basis of his personal prejudice constitutes a refusal by that court to allow a litigant before it to be heard. Such a refusal constitutes a denial of due process of law by the Court of Appeal.

Where a state provides for appeals in criminal cases, the proceedings on such appeal are part of the process of law under which convictions must stand or fall under the due process clause. (Cole v Arkansas (1948) 333 U.S. 196, 201.) Due process requires that an opportunity be granted, at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case. (Boddie v. Connecticut (1971) 401 U.S. 371, 378; cf. Eskridge v. Washington State Board (1958) 357 U.S. 214.)

The requirements of due process that "justice must satisfy the appearance of justice" are simply not met when a reviewing court refuses to deal with contentions made by an appellant, or when it decides them on the basis of erroneous characterizations of the record. (See Proctor v. Warden, Maryland Penitentiary, ___ U.S. ___ [No. 77-5898, April 17, 1978,

23 Crim.L.Rptr. 4024, 4025].)

It has been well established that an indigent appellant is entitled to the services of an attorney who will argue every contention which arises from the record with vigor and skill. (Anders v. California (1967) 386 U.S. 738.) Implicit in this is the premise that the court receiving such contentions will give them conscientious consideration and decide them according to law. As this case demonstrates, this premise is not necessarily taken as given by all courts. The state supreme court, unfortunately, does not consider it of sufficient importance to warrant its attention that a lower court has proceeded in a "merely" incorrect manner.

We respectfully submit, therefore, that this Court should act to expressly guarantee the right of an appellate litigant to the full and fair consideration of his nonfrivolous contentions in light of the actual content of the record and the applicable constitutional and state law by declaring such consideration to be guaranteed by due process.

The enforcement of such a discipline

upon first-level courts of appeal will, we believe, greatly serve the cause of judicial economy as well as the cause of justice.

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II

WHERE RESOLUTION OF A CRIMINAL CASE REQUIRES THE ASSESSMENT OF THE CREDIBILITY OF CONFLICTING WITNESSES, DUE PROCESS REQUIRES THE TRIER OF FACT PERSONALLY HEAR THE TESTIMONY

As suggested above, petitioners do not so much ask here whether they were accorded a "fair trial", for that would presuppose they had a trial. They ask instead whether the Constitution allows a contested accusation of crime to be adjudicated by means of a system in which the person who hears the case cannot decide it, and the person who decides it does not hear it.

The answer to this question was correctly given last term by three justices of this Court:

"[A]s is self evident . . . the master's function at the hearing is, in large part, to assess the credibility of witnesses. That function simply cannot be replicated by the "Judge", acting in his essentially appellate capacity

reviewing the record; as amicus cogently notes, "[t]trials by transcript can never be more than trials by substantial evidence." (Swisher v. Brady (1978) ___ U.S. ____ [57 L.Ed.2d 705, 725] Marshall, J. dissenting.)

Before going further, it should be said that there may seem to be an inconsistency between this point and Part I, ante. Any inconsistency, however, is the direct product of the worst-of-both-worlds double standard which has been created by California courts: a reporter's transcript is sufficient for a trial determination of guilt beyond a reasonable doubt, but not so on the appellate level.

It is our view that either a transcript is sufficient or it isn't. Moreover, we think it not inconsistent to argue that a reviewing Court should consider the evidence of innocence on appeal as well as the correctness of a verdict, giving due deference to determinations of witness credibility made by a trier of fact, while also insisting that such determinations not be made at trial on the basis of transcripts which do not contain the very "demeanor" information necessary to

fix credibility.

A. The Nature Of The California Referee System

The powers of the California juvenile referee are sharply circumscribed. The State Constitution, Article VI, section 22, limits him to the performance of "subordinate judicial duties". No sentence imposed by him is effective until countersigned by a judge. (Cal. Welf. & Inst. Code § 249; see also Ibid. § 251.) Above all, he cannot make findings of fact in the cases he hears. (In re Edgar M. (1975) 14 Cal.3d 727 [537 P.2d 406]; see also Jesse W. v. Superior Court (1978) 20 Cal.3d 893, fn. 5 at 899 [576 P.2d 963], cert. pdg. California v. Jesse W., # 78-327.)

Instead of simply deciding that cases should be assigned for trial to judicial officers having decision-making authority, the Edgar M. court held that henceforth, while referees would not decide cases, they would keep their jobs. Trials would still be involuntarily assigned to them. They would continue to hear the testimony of witnesses. After the testimony was presented, a transcript of it would be typed

up and presented to the juvenile court judge. (Cal. Welf. & Inst. Code § 252.) The judge would read the transcript and make an "independent", de novo determination of the case.

The Court declared that a written transcript would provide the judge with enough information to "independently" decide the case:

"Thus, a judge's decision to deny the application [for rehearing] and hence adopt the referee's determinations as those of the Court is based on data amply sufficient for the forming of a judgment independent of that of the referee." (In re Edgar M., supra, 14 Cal.3d at 735-736.)

This astounding pronouncement is, of course, contrary to the wisdom of centuries of jurisprudential thought, exemplified in the following statement by Jerome Frank:

"A stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated

peach; it has neither the substance nor the flavor of the fruit before it was dried." (Broadcast Music v. Havana Madrid Restaurant Corp. (2nd Cir. 1949) 175 F.2d 77, 80.)

It is also contrary to the California court's assessment of its own abilities to "independently" second guess the referees who find facts for it in original proceedings. (In re Hurlic (1977) 20 Cal.3d 317, 325, [572 P.2d 57].)

The California court also did not try to reconcile its results in Edgar M. with prior statements of this Court holding that the right to confront witnesses contemplates the right to have the confrontation occur before the actual trier of fact:

". . . '[t]he primary object of the [Confrontation Clause of the Sixth Amendment] . . . was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand

face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' (Mattox v. United States (1895) 156 U.S. 237, 242-243"; Barber v. Page (1968) 390 U.S. 719, 722, see also Berger v. California (1969) 393 U.S. 314, 315.)

A final question, made inescapable in the wake of trials-by-transcript, is whether the state can continue to maintain a separate criminal court system for juveniles wherein fundamental constitutional rights including bail and trial by jury are withheld, where all decisions are made by some incorporeal entity who sits like the Wizard of Oz behind the closed doors of his chambers? Where in that is there the "concern", the "sympathy" and the "paternal attention" which this Court has postulated to be the justification for withholding essential rights from the young? (McKeiver v. Pennsylvania, (1971) 403 U.S. 528, 550.)

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CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeal.

Respectfully submitted,

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State Public Defender

EZRA HENDON
Chief Assistant
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LAURANCE S. SMITH
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APPENDIX A

APPENDIX 'A'

(Text of Unreported Opinion
of the California State Court of Appeal)
[Original page numbers in brackets]

[1]Pursuant to Welfare and Institutions Code section 602 separate petitions were filed in juvenile court charging each of the minor brothers, Donald, 15 years of age, and Dennis, 16-years-old, with attempted robbery by means of force and fear. (Pen. Code, §§ 211, 664.) Dennis additionally was charged with malicious mischief. (Pen. Code, § 594.) The petitions were heard by a referee who found the allegations sustained beyond a reasonable doubt and Donald and Dennis to be persons described in section 602. Defendants' application for rehearing was denied. Following the disposition hearing, Donald was placed on six months' probation under the supervision [2] of the probation officer; Dennis was declared a ward of the court and placed him in the custody of his parents and was ordered to make restitution in the amount of $75.16; in addition both Donald and Dennis were ordered to participate in the juvenile hall work program for 16 hours or two weekends. Both minors appeal from the "judgment".

The minors contend they were deprived of a fair hearing guaranteed by the due process clause of the constitution. They assert the referee was biased and determined their guilt on speculation and his personal opinion, which, in effect, resulted in the application of the substantial evidence standard of proof rather than the reasonable doubt standard.

We have reviewed the record, including the comments of the referee and his notice of decision and find the minors' assertions that he was biased and that he approached his task of fact-finding in a "sloppy and shoddy manner" to be totally unfounded.

California courts have applied the reasonable doubt standard since the United States Supreme Court in In re Winship (1970) 397 U.S. 358, 377-378 [25 L.Ed.2d 368, 382-383] held that juveniles, like adults, were constitutionally entitled under the due process clause to proof beyond a reasonable doubt at the adjudicatory stage when they are charged with an act which would constitute a crime if committed by an adult. (In re Roderick P. (1972) 7 Cal.3d 801, 809; [3] Richard M. v. Superior Court (1971) 4 Cal.3d 370, 378.)

Reasonable doubt is defined as not a mere possible doubt. "It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." (Pen. Code, § 1096; People v. Miller (1916) 171 Cal. 649, 652.) Thus to justify a criminal conviction the trier of fact must be reasonably persuaded to a genuine certainty. (People v. Hall (1964) 62 Cal.2d 104, 112; People v. Garcia (1975) 54 Cal.App.3d 61, 66-67.)

Here Loren Perry testified that in July 1977, at approximately 1:15 a.m., after he had parked and locked his car in the sales area of a mobile home sales parking lot which was across the street from the Hawaiian Hut, a bar, Donald approached him with a knife and crescent wrench and demanded his wallet. Perry then saw Dennis standing at the rear of his car holding a two-to-three foot square pipe. When Perry told defendants that he did not have his wallet with him, they demanded that he give them his money. Perry was ordered to empty his pockets and when defendants

saw that he was not carrying any money on him they fled. Perry, enraged, went after them; he caught Donald as he was climbing over a chain link fence and took him over to the Hawaiian Hut and had the police summoned. [4]

Both defendants and the girl who was with them testified. The gist of their testimony was that defendants were helping the girl unpack; it was hot so they went outside and started walking down the street; the girl wanted to see some of the mobile homes so they were wandering through the area when Donald left the other two to go to the service station to go to the bathroom. Perry drove into the parking area, opened the door, called Donald over to the car and propositioned him; Donald pulled out a crescent wrench that he had in his pocket and yelled to Dennis; Dennis ran over and told the girl to get away from there; Dennis hopped over a fence; Perry went after Donald, catching up with him as he started over the fence; following a brief fight Perry escorted Donald to the Hawaiian Hut.

In his notice of decision the referee stated that he was convinced beyond a

reasonable doubt that both minors committed the attempted robbery as charged. He indicated he found Perry's testimony to be plausible whereas he was skeptical of the defendants' theory, stating that "the rather slightly built victim would never have physically pursued and engaged either of these boys in a test of strength unless he was, as he testified, quite enraged. Surely the mere failure of Donald to accept an invitation into his automobile would not have evoked such a reaction."

The evidence gives rise to this conclusion. The referee was not required to believe the defendants' or the [5] girl's testimony. (See People v. Harrison (1969) 1 Cal.App.3d 115, 119.) The determination of the credibility of witnesses and the inferences to be drawn from the evidence are matters within the province of the trier of fact. (Id., at p. 120.) The totality of circumstances in this case supports the conclusions drawn by the referee.

The notice of decision reflects that the referee applied the proper standard of proof. Moreover, we find nothing in the record to support defendants' assertions that the referee was "biased", that

he resolved the matter on the basis of his personal opinion, or that he tried the case according to "the same rules as were employed in circa 1603. . . ."

Defendants contend that the constitutional guarantees of due process and equal protection require the juvenile court judge who rules on the application for rehearing to hear the evidence personally. Defendants concede that this precise contention has been resolved adversely to them. (See, In re Gregory M. (1977) 68 Cal.App.3d 1085, 1093-1094; In re Jay J. (1977) 66 Cal.App. 3d 631, 633-634. See also, In re John H. (1978) 21 Cal.3d 18, 25; In re Edgar M. (1975) 14 Cal.3d 727, 735-736.) We are not persuaded to deviate from the holding of those cases.

Defendants ignore the doctrine of stare decisis when they argue that the standard of appellate review of a juvenile court proceeding, where trial by jury is denied, should be whether guilt is established beyond a reasonable doubt rather [6] than by substantial evidence.

The Supreme Court has held that the principles of appellate review in criminal trials are applicable to the appellate

courts in considering the sufficiency of the evidence admitted in the juvenile proceeding. (In re Dennis B. (1976) 18 Cal. 3d 687, 697; In re Roderick P., supra, 7 Cal.3d at p. 809.) We are bound by the statements of law of the Supreme Court. (People v. Triggs (1973) 8 Cal.3d 884, 890-891; Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

Viewing the evidence in a light most favorable to the judge's findings, as we are required to do (In re Roderick P., supra, 7 Cal.3d at p. 809; see also People v. Reyes (1974) 12 Cal.3d 486, 496-497), we reject defendants' contention that there is insufficient evidence to support the finding that Dennis was guilty of the offense of malicious mischief.

A sergeant of the United States Army Military Police had just driven into the parking lot of Springer's liquor store and was talking to his wife when he saw a person, whom he identified as Dennis, using foul language and kicking the back of a small Ford Pickup truck. When the vehicle pulled away the sergeant saw Dennis turn and kick the door of the liquor store and he saw him "breaking the glass".

The crime of violating Penal Code section 594 (malicious mischief or vandalism) requires the malicious injury to or destruction of real or personal property. The word "maliciously" as used in section 594 imports a wish to vex, annoy or have the intent to do a wrongful act. (Pen. Code, § 7, subd. (4).) Malicious intent is to be presumed from the deliberate commission of an unlawful act. (People v. Kreiling (1968) 259 Cal.App.2d 699, 705.) (1968) 259 Cal.App.2d 699, 705.) It is established by the sergeant's testimony that the glass was broken by Dennis and there is substantial evidence that Dennis' act of kicking the glass door was an act of vandalism. Dennis' suggestion that Springer's liquor store conceivably was operated by a trust of which he was a beneficiary is patently without merit.

The orders of the juvenile court from which Donald and Dennis appeal are affirmed.

REGAN, J.

We concur:

PUGLIA, P.J.

PARAS, J.

APPENDIX B

APPENDIX 'B'

(Text of Memorandum from Juvenile Referee)
[Original page numbers in brackets]

NOTICE OF DECISION

Gentlemen:

[1]The minor, Dennis Delaney, is charged with two counts: (1) malicious mischief by damaging a window belonging to Springer's Liquor Store, and (2) attempted robbery of one Loren Perry.

The Court is convinced that Count 1 was proven beyond a reasonable doubt from the direct testimony of Jeffrey Rinaldi, an Army M.P. who happened to be present when he observed the minor kicking the door of the liquor store and hearing the sound of apparent breaking glass. The circumstantial evidence was clear that the store did not belong to the minor, since it bore the name Springer's Liquor Store, and further it would be highly unreasonable that he would deliberately damage his own property. This evidence was uncontradicted.

Donald Delaney was also charged with the attempted robbery of Loren Perry in the only count charged against this minor. The Court is convinced beyond a reasonable doubt that both minors committed the

attempted robbery as charged in their respective petitions. The victim testified that he observed both minors; Donald being armed with a knife and crescent wrench, and Dennis standing nearby with a piece of pipe. Donald informed the victim that he wanted the victim's wallet, and only after the victim emptied his pockets, revealing only a few coins, did the minors leave. The victim testified that when they left, he pursued them and physically took the younger Donald into custody, dragged him to the nearby Hawaiian Hut and had the authorities called to the scene. The victim had earlier testified that he had parked in the more secluded mobile sales park since he was concerned [2] about his automobile, which he considered to be more or less a collector's item. In corroboration he testified this to be a 1955 Nash Ambassador Country Club Coupe.

The Court could find nothing inherently unreasonable in the testimony of the victim.

In defense, the boys testified that the victim had made homosexual advances to the younger boy. That this led to the older boy, Dennis, intervening between the victim and Donald, ultimately resulting in the

victim apparently becoming enraged by the rejection and taking Dennis forceably into custody. The minors' counsel argued that this reaction may well have resulted from Mr. Perry believing it would protect him from later possible charges of unlawful solicitation for immoral purposes. While, fortunately, the Referee has had little contact with homosexuals, he remains of the opinion that this argument, while ingenious, is totally unconvincing and raises no reasonable doubt.

The testimony of the young lady friend who they called as a witness was marked by at least one substantial inconsistency and, in all, her testimony was of no help to these young boys.

In summary, the Court can see little point in carefully dissecting the testimony of Dennis and Donald. In short, it is the firm opinion of the Court that the rather slightly built victim would never have physically pursued and engaged either of these boys in a test of strength unless he was, as he testified, quite enraged. Surely the mere failure of Donald to accept an invitation into his automobile would not have evoked such a reaction. Assuming

the Hawaiian Hut to be in fact a bar frequented by the gay community, it is the personal opinion of the Court that the minors believed such a person would be "easy pickings", a mistake in judgment which I trust they regret.

A formal order will issue setting the Disposition Hearing.

Very truly yours,

JAMES F. ROACH
Juvenile Referee

APPENDIX C

APPENDIX 'C'

(Text of Petition for Rehearing
In the California State Court of Appeal)
[Original Page Numbers in Brackets]

TO THE HONORABLE ROBERT K. PUGLIA, PRESIDING JUSTICE, AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL, THIRD APPELLATE DISTRICT:

[1]Appellants petition for a rehearing of the court's order of August 8, 1978, on the following grounds:

I

THE COURT'S OPINION EVIDENCES NO CONSIDERATION OF THE MAIN ISSUE PRESENTED BY THE APPELLANT

At page 5 of its opinion the court recites the truism that "The determination of the credibility of witnesses and the inferences to be drawn from the evidence are matters within the province of the trier of fact". Totally ignored by the court is the fact that the referee who heard the evidence was not the trier of fact; the judge was the trier of fact, and he did no more than read the same reporter's transcript to which this court so glibly applies the substantial evidence rule! [2]

The minors' argument to this court was

that where, as here, the decision of a case requires the assessment of the credibility of conflicting witnesses, a reporter's transcript does not provide the judge/trier of fact with sufficient information to assess the credibility of the witnesses. Deprived of such sufficient information, the judge can discharge neither his state constitutional duty to confine the referee to the performance of "subordinate judicial duties" (In re Edgar M. (1975) 14 Cal.3d 727); nor can he make a reliable finding of any fact beyond a reasonable doubt in accord with the requirements of the federal constitution. (In re Winship (1970) 397 U.S. 358.)

It is exactly as three justices of the United States Supreme Court put it a few weeks ago: "[t]rials by transcript can never be more than trials by substantial evidence". (Swisher v. Brady 6/28/78, ___ U.S. ___ [23 Cr.L.Rptr. 3189, 3197].) Trial by substantial evidence is, of course, exactly the way things were done circa 1603, before there was a Bill of Rights to guarantee the right to have one's defense heard and considered. It does not meet the requirements of due

process.

Even if the referee here were empowered to act as a trier of fact, moreover, his open statements to the effect that he was not going to give careful consideration to the minors' defense after reaching the conclusion that the complainant's testimony was not "inherently unreasonable" do indeed reveal that the referee was himself not trying this case according to anything besides the substantial evidence rule. [3]

In our respectful opinion, this reviewing court has a public obligation to use its powers to see to it that cases are not resolved according to unreliable and third-rate methods. That obligation is not discharged when the extensively researched contentions of an appellant regarding a sensitive question of law - acknowledged by the court during argument to be one of first impression - going to the heart of the integrity of the factfinding process, are treated as if they had not been made. Further, the requirements of due process of law (United States Constitution, Amt. XIV) are also violated when an appellant's clearly substantial contentions on appeal are ignored. (Cole v. Arkansas (1948) 333 U.S. 196, 201.)

II

THE COURT'S OPINION MISSTATES CRUCIAL PARTS OF THE EVIDENCE

Among other points advanced on appeal was that it was improper for the referee to have resolved the conflicts in the evidence on the basis of his "personal opinion" that appellants were hostile to homosexuals and considered them "easy pickings" for mugging when such opinion was supported by no evidence.

At page 5 of its opinion, the court states "Moreover, we find nothing in the record to support defendant's assertions that . . . he resolved the matter on the basis of personal opinion. . . ."

This conclusion is belied by what appears at page [4] 2 of the clerk's supplemental transcript on appeal:

". . . it is the personal opinion of the court that the minors believed such a person [i.e., a homosexual] would be 'easy pickings'. . . ." (emphasis added.)

While this court is doubtless possessed of considerable latitude in interpreting the contents of an appellate record, we respectfully submit that the state and federal guarantees of due process of law

(United States Constitution, Amt. XIV) do not permit a reviewing court to reject an appellant's contention by making portions of the record which support it disappear.[1] [5]

CONCLUSION

Taken as a whole, the reasons given by the referee for sustaining this petition do not lead to an inference that this petition was found true by one who was "reasonably persuaded to a genuine certainty". (cf. opinion p. 3); indeed, as we have suggested in our third point on appeal (AOB p. 26 ff.), the evidence does not rise to that level which would permit a reviewer to find that any reasonable trier of fact could have been so convinced if all the evidence were taken into account rather than just that part of it which, in total isolation, supports the judgment.

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1. It was also not "suggested" by Dennis D. that he had a beneficial interest in Springers' liquor store. We were quite careful to say only that there were a number of logical possibilities concerning the ownership of the store, and that it was the People's burden to show that the store was the property of another. This they made no attempt to do.

It is for these reasons that we request the granting of a rehearing, and the correction of a palpable miscarriage of justice.

DATED: August 11, 1978

Respectfully submitted,

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